No. 43947-6-II

COURT OF APPEALS, DIVISION II,

FOR THE STATE OF WASHINGTON

LINDA KALASH,

Respondent,

v.

DEPARTMENT OF EMPLOYMENT SECURITY,

Appellant.

RESPONDENT MS. KALASH'S REPLY BRIEF

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ORIGINAL

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A. INTRODUCTION

Ms. Kalash "***was offered a position*** as a cook ***with KinderCare, to begin May 31, 2011. The job description and the rate of pay were established; the hours were to be 35-40 hours per week. Claimant gave the interested employer*** **[La Petite Academy]** ***notice on May 16, 2011 that her last day would be May 27, 2011."*** After she resigned, the new "**job offer was revoked**." CP Comm. Rec.84 (emphasis added).

When Ms. Kalash applied for unemployment benefits, the ESD denied her those benefits, holding that Ms. Kalash had an obligation to rescind her resignation from La Petite once the KinderCare[1] job fell through and had an obligation to "exhaust" alternatives to quitting – two requirements that do not exist in the statute or its regulations. CP Comm. Rec. 84-86.

On Ms. Kalash's appeal for judicial review, the Hon. Thomas McPhee of the Thurston County Superior Court reversed the ESD, finding that Ms. Kalash had resigned for "good cause" due to a bona fide job offer under the plain language of the statute. CP 39-42. The ESD appealed. CP 45-50.

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[1] Though this business is spelled variously in the record, the business itself appears to use the spelling KinderCare, which will be used in this brief unless quoted material spelled it differently.

B. STATEMENT OF THE CASE IN REPLY

1. AFTER MS. KALASH RESIGNED, HER OLD JOB WAS FILLED AND HER NEW WORKPLACE SAID THEY WOULD "WORK HER IN."

Ms. Linda Kalash testified under oath that she quit her job at La Petite Academy to take a job with KinderCare in Bremerton:

ALJ: Did you quit this job?

Ms. Kalash: Yes, I did.

ALJ: At the time you quit, did you have any other employment promised to you elsewhere?

Ms. Kalash: Yes, I did.

ALJ: **Did you quit this job to take that other job?**

Ms. Kalash: **Yes, I did.**

ALJ: Who was that other job with?

Ms. Kalash: It was with Kindercare in Bremerton, Washington.

* * *

ALJ: Were you hired there before you gave notice that you were quitting at La Petite?

Ms. Kalash: Yes, I was.

ALJ: Who hired you?

Ms. Kalash: Jill Metcalf, director of Kindercare.

CP Comm. Rec.18 (emphasis added).

The Commissioner made a factual finding affirming the bona fide job offer. CP Comm. Rec. 84. But the job at KinderCare fell through:

> ALJ: Did you start working for Kindercare?
>
> Ms. Kalash: No.
>
> ALJ: Why not?
>
> Ms. Kalash: Because the day – the night before my last day of work, I received a phone call and Jill told me that the cook decided to stay after her two weeks' notice and so, therefore, **I would have to wait for a position for a teacher or if she didn't work out,** because she had already given notice. **Then she would try to work me in.**

CP Comm. Rec.20 (emphasis added).

The State's brief in this case makes the following factual claim: "The employer would have retained Kalash had she asked to continue working." For this factual claim, the State cites CP Comm. Rec. 31. The only testimony from the employer at page 31 of the record is as follows:

> **ALJ:** . . . Did you – you didn't replace her [Ms. Kalash] until the 14th of June?
>
> **Employer:** No, because ***I did already have somebody that has done the kitchen as a backup in my center*** that had their food handler's. So in the meantime I was trying to find a replacement to take Linda's spot. And it was – it was a little

difficult, you know, but ***I did find a replacement.***

I do – you know, like I said, we – I mean, it is part-time hours. That's what we had available. That's what I hired Linda for, is part-time, which is 32 hours or less.

ALJ: Anything else, Ms. Crosbie?

Employer: No, Your Honor.

CP Comm. Rec. 31.

This testimony says nothing about what the State claims it says, that the employer would have retained Ms. Kalash had she continued working. The State in the same place also cites as authority for this dubious factual claim, CP Comm. Rec. 35-36. Those pages are designated as closing argument. As the ESD recognizes, argument is not evidence. *In re Peters*, Emp. Sec. Comm.r Dec. 2d 377 (1978).

But even in what is designated as argument, the employer states Ms. Kalash had been replaced and she would have been doing different duties then those she had been doing: "she could have worked in a classroom because she also did like to work in a classroom . . ." CP Comm. Rec. 36. And the employer's closing argument confirms Ms. Kalash's job was already filled:

ALJ: When did – when did – so when she [Ms. Kalash] left, you did have a replacement for

her? You had somebody who was working for you that had to fill in?

Employer: Yes, correct.

ALJ: But then you – were you in the process of hiring someone to take her position?

Employer: I was looking at – I did a couple interviews and I did find somebody, but they didn't start until June 14th.

ALJ: When did you hire that person?

Employer: June 14th. That's when they started.

CP Comm. Rec. 36. The employer then clarified that the person replacing Ms. Kalash had been hired a few days before starting on June 14. CP Comm. Rec. 37. Most importantly, there is no evidence in the record that whether or not there was continuing work, the old employer made no job offer to Ms. Kalash.

The employer's testimony is consistent with Ms. Kalash's testimony that she did not ask for her job back (even though there is no legal requirement that she do so) because she had already trained her replacement:

ALJ: Did you talk to anyone at La Petite about that, about possibly getting your job back?

Ms. Kalash: I didn't speak with anyone about it. **I felt that I had already trained someone for the kitchen and my job was not there.**

CP Comm. Rec. 20 (emphasis added). Indeed, as the employer testified in the quotations above, her old job *was not there*.

Further, the new workplace had not rejected Ms. Kalash but told her only that she would have to "wait" because the person she was to replace had decided to stay: "I received a phone call and Jill told me that the cook decided to stay after her two weeks' notice and so, therefore**, I would have to wait for a position for a teacher or if she didn't work out,** because she had already given notice. Then **she would try to work me in**." CP Comm. Rec.20 (emphasis added). Finally, she had no reason to ask for her old job back "because they told me at Kindercare that they hoped that there would be an opening soon . . . ." CP Comm. Rec.32.

2. PROCEDURAL HISTORY

The Superior Court reversed the ESD's Commissioner in this case, holding the ESD erred in misapplying and misinterpreting the good cause quit provisions of the Employment Security Department

because Ms. Kalash did not quit her job until she had a "bona fide job offer" of another job. The State now appeals.[2] CP 45-50.

D. ARGUMENT IN REPLY

1. BECAUSE QUITTING AND RESIGNING ARE SYNONYMS, MS. KALASH "QUIT" HER JOB WHEN SHE RESIGNED ON MAY 16 AFTER RECEIVING A BONA FIDE JOB OFFER OF ANOTHER JOB; SHE QUIT THEREFORE FOR GOOD CAUSE UNDER THE PLAIN LANGUAGE OF THE STATUTE.

No dispute exists that Ms. Kalash resigned from her job only after receiving a bona fide job offer and the Commissioner's Order here makes that bona fide job offer a finding of fact. CP Comm. Rec. 84.

Moreover, the Commissioner found that Ms. Kalash "gave notice on May 16 . . ." CP Comm. Rec. 84.

An individual has "good cause" to quit and to qualify for unemployment benefits, in the double negative language of statutes, in the following circumstance:

> (b) An individual shall not be considered to have left work voluntarily without good cause when:

[2] Per the Court of Appeals, Division II's General Order 2010-1, the respondent files the opening brief in administrative review cases and accordingly is filing this subsequent brief in reply to the State's brief.

(i) He or she has left work to accept a bona fide offer of bona fide work as described in (a) of this subsection;

RCW 50.20.050(2)(b)(i).

The regulation pertaining to quitting for a "bona fide job offer" states as follows:

> **If you leave work to accept a bona fide offer of employment, you will have good cause** within the meaning of RCW 50.20.050 if you satisfactorily demonstrate that:
>
> (1) Prior to leaving work, you received a definite offer of employment; and
>
> (2) You had a reasonable basis for believing that the person making the offer had the authority to do so; and
>
> (3) A specific starting date and the terms and conditions of the employment were mutually agreed upon; and
>
> (4) You continued in your previous employment for as long as was reasonably consistent with whatever arrangements were necessary to start working at the new job; and
>
> (5) The new job is in employment covered by Title 50 RCW or the comparable laws of another state or the federal government.

WAC 192-150-050 (emphasis added).

The Merriam-Webster Dictionary defines the word "quit" to include "to give up employment." It lists several synonyms for "quit," including "leave," "resign," and "give notice." *Merriam-*

Webster, retrieved from http://www.merriam-webster.com/dictionary/quit *on March 13, 2013.* Similarly, the definition of "resign" includes "to give up one's office or position." *Merriam-Webster, retrieved from* http://www.merriam-webster.com/dictionary/resign *on March 13, 2013.* The many definitions of the verb "leave" in that dictionary say nothing about employment.

From the plain language of the statute and the dictionary definitions of the words involved in this case, Ms. Kalash quit her job on May 16 when she gave her notice (as the Commissioner found, CP Comm. Rec. 84) because one quits one's work when one resigns, not when one walks out the door for the last time. The State strains to argue the latter. And it misstates the law in the process.

On the first substantive page of the State's brief, the following legal claim is made: "Under the Act's voluntary quit statute, a claimant quits work on the date she leaves work, not the date she notifies her employer of her intent to quit on a date certain. RCW 50.20.050(2)(a)." State's brief, pg. 1. In the arcane details of *Bluebook* citation, the lack of any signal (*e.g., see, see also,* etc.) preceding a legal citation such as shown in the quoted material

from the State, means that the "[c]ited authority (i) *directly states* the proposition, (ii) identifies the source *of a quotation*, or (iii) identifies an authority referred to in the text." *The Bluebook: A Uniform System of Citation* 22 (17th ed. 2000) (emphasis added).

So the reader would expect to find at RCW 50.20.050(2)(a) either a quotation or a direct statement of what the State claims, that one "quits work on the date she leaves work, not the date she notifies her employer of her intent to quit." But that is a ***complete misstatement*** of what one finds there:

> (a) An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has left work voluntarily without good cause and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount.

RCW 50.20.050(2)(a). This long convoluted sentence *says absolutely nothing that resembles what the State's brief claims it says about when one is deemed to have left one's work*. As the dictionary definitions state, one quits one's work when one resigns or gives notice. The Commissioner here found Ms. Kalash "gave notice" on May 16. CP Comm. Rec. 84. When she did so, as the Commissioner also found, she had a bona fide job offer of another job. *Id.* Therefore, as the Superior Court held here, Ms. Kalash had

"good cause" to quit for a bona fide job offer and should have been granted benefits.

2. MS. KALASH HAD NO OBLIGATION TO CONTINUE TO WORK FOR HER OLD JOB FROM WHICH SHE HAD RESIGNED ON MAY 16 BECAUSE HER POSITION HAD BEEN FILLED AND THE LAW DOES NOT REQUIRE SHE RESCIND HER RESIGNATION OR RETURN TO DIFFERENT WORK.

Ms. Kalash testified that after she quit on May 16, though she had interviewed for other jobs, she had received no job offers. CP Comm. Rec.16. This was true despite the State's claim that the former employer had continuing work for her and its implicit argument that she was under some legal obligation to either rescind her resignation or accept work that was never offered.

And even if there were continuing work at her old worksite and even if there had been an offer of that work *after Ms. Kalash had resigned on May 16,* the change in working conditions constituted "new work" that was "unsuitable work" under the Employer Security Act. The Act prohibits the denial of unemployment benefits to a worker who declines to accept new work when the wages, hours, **or other conditions of work** are unsuitable because they are substantially less favorable than the prior job:

> Notwithstanding any other provisions of this title, ***no work shall be deemed to be suitable*** and ***benefits shall not be denied*** under this title to any otherwise eligible individual ***for refusing to accept new work*** under any of the following conditions:
>
> * * *
>
> (2) if the remuneration, hours, ***or other conditions of the work offered are substantially less favorable to the individual*** than those prevailing for similar work in the locality;

RCW 50.20.110 (emphasis added).

An ESD regulation expands on the notion that one cannot be denied benefits for refusing new work and defines "substantially less favorable":

> (1) Section 3304 (a)(5) of the Federal Unemployment Tax Act and RCW 50.20.110 state that you cannot be denied benefits if you refuse to accept new work when the wages, hours, or other working conditions are substantially less favorable than those prevailing for similar work in your local labor market.
>
> (2) For purposes of this chapter, "new work" includes an offer by your present employer of:
>
> **(a) Different duties than those you agreed to perform in your current employment contract or agreement; or**
>
> (b) Different terms or conditions of employment from those in the existing contract or agreement.
>
> * * *

WAC 192-150-150 (emphasis added).

Further, "suitable work" is defined by statute:

> (1) Suitable work for an individual is employment in an occupation in keeping with the individual's prior work experience, education, or training and if the individual has no prior work experience, special education, or training for employment available in the general area, then employment which the individual would have the physical and mental ability to perform. ***In determining whether work is suitable for an individual, the commissioner shall also consider*** the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, the individual's length of unemployment and prospects for securing local work in the individual's customary occupation, ***the distance of the available work from the individual's residence***, and ***such other factors as the commissioner may deem pertinent***, including state and national emergencies.

RCW 50.20.100 (emphasis added).

But because there was no offer of new work, despite the State's brief implying *there might have been*, Ms. Kalash was under no obligation to accept work that had not been offered.

Ms. Kalash was entitled to benefits because she resigned on May 16 for a bona fide job offer, she was under no obligation to rescind that resignation, and even if a job offer had been made to her by her former employer – which there was not – she was under no legal obligation to accept it.

3. ASIDE FROM THE PLAIN LANGUAGE OF THE STATUTE, THE PLAIN DEFINITIONS OF QUITTING, AND THE ABSENCE OF A REQUIREMENT TO RESCIND ONE'S RESIGNATION, THE LIBERAL CONSTRUCTION THAT IS TO BE GIVEN THE STATUTE REQUIRES AFFIRMATION OF THE SUPERIOR COURT'S DECISION.

The ESD and the State in this case have invented numerous new requirements for a bona fide job offer, have strained to argue the language of the statute means something it does not say, and have misrepresented that language by citing to authority that does not state what the State claims it states. And all of this despite the Legislative mandate and a mandate from the United States Supreme Court that the ESD has been well aware of for more than 65 years: the statute is to be liberally construed in favor of the claimant.

To achieve its purpose, the Employment Security Act must be liberally construed in favor of the unemployed worker. RCW 50.01.010. When the legislature mandates liberal construction in favor of the worker, courts ***should not narrowly interpret provisions to the worker's disadvantage*** when the statutory language does not suggest that such a narrow interpretation was intended. *Delagrave v. ESD,* 127 Wn. App. 596, 609 (2005)

(emphasis added). This citation, without a signal, means exactly what no signal is supposed to mean - the proposition cited is directly supported by the cited source:

> When the legislature mandates liberal construction in favor of the worker, ***we should not narrowly interpret provisions to the worker's disadvantage when the statute does not suggest that such a narrow interpretation was intended.***

Delagrave v. ESD, 127 Wn. App. at 609. The ESD's and the State's argument in this case demonstrate a very narrow interpretation of the statute's provisions, devised to the disadvantage of the worker.

Over 65 years ago, the United States Supreme Court held that the federal unemployment law was to be liberally interpreted:

> As the federal social security legislation is an attack on recognized evils in our national economy, **a constricted interpretation of the phrasing** by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.

United States v. Silk, 331 U.S. 704, 712 (1947)(emphasis added).

The ESD's and the State's arguments in Ms. Kalash's case in attempting to find a way to deny her benefits are the best

demonstration of this "constricted interpretation of the phrasing" of the Act that one can imagine.

The federal courts in the decades since the United States Supreme Court's decision in 1947 have continued to demand liberal interpretation of unemployment statutes. *See, e.g., Farming, Inc. v. Manning*, 212 F.2d 779, 782 (3rd Cir. 1955).

And in 2007, Washington's Employment Security Department published a 32 page research paper on the subject: *Liberal Construction*, available at http://www.esd.wa.gov/newsandinformation/legresources/uistudies/liberal-construction-2007.pdf . In that paper, the ESD noted the following:

> Based on these two rulings [*Silk* and *Farming, supra*], the United States Department of Labor (DOL) "has long taken the position that, because FUTA [Federal Unemployment Tax Act] is a remedial statute aimed at overcoming the evils of unemployment, ***it is to be liberally construed to effectuate its purposes and exemptions to its requirements are to be narrowly construed***." DOL has issued several unemployment-insurance program letters over the years in which they restate their position on this subject.

Id. at 2 (emphasis added). On seven pages of that paper the ESD cites to and summarizes in excess of 40 Washington Supreme Court or Court of Appeals cases that have affirmed the liberal

construction to be afforded the Washington Employment Security Act. *Id.* at 23 – 29.

That construction mandates that the Superior Court decision in this case be affirmed. Ms. Kalash quit her job on May 16 when she had a bona fide job offer. That job offer fell through. In fact, what happened in this case is exactly what is expected to happen in "bona fide job offer" cases: the claimant quits to accept a bona fide job offer and the job falls through. If this were not the factual scenario anticipated by this provision of the statute, it would make no sense – because if the bona fide job offer *does not fall through* then there is no unemployment.

It is only when a bona fide job offer falls through that the statute provides for "good cause" for the resignation and provides that the claimant is eligible for benefits. Thus, under the plain language that is to be liberally construed in this case, Ms. Kalash quit her job for a bona fide job offer on May 16; when that job offer fell through, she was under no legal obligation to rescind her resignation or return to different work at the old employer, work that was never offered to her by the employer. She was therefore entitled to unemployment benefits as Judge McPhee of the

Thurston County Superior Court held and Ms. Kalash respectfully requests this Court affirm that holding.

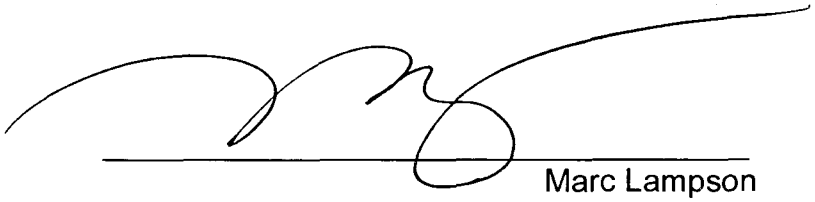
E. CONCLUSION

For the reasons stated above, Linda Kalash respectfully requests that this Court affirm the Superior Court's Order that correctly reversed the Commissioner's Order in this case as an error of law.

The Superior Court correctly found that the "bona fide job offer" provisions of the Employment Security Act were met and that good cause to quit was established. Counsel also requests reasonable attorney fees and costs for the time spent in bringing about an award of benefits to Ms. Kalash.

. Dated this 14th day of March 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

CERTIFICATE

I certify that I emailed an electronic and mailed a paper copy of the Respondent's Reply Brief in this matter on March 14, 2013, to the Respondent ESD's attorney, April Benson Bishop, Office of the Attorney General, 800 Fifth Ave, Suite 2000, Seattle, WA 98104-3188.

Dated this March 14, 2013

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